

2004

Ameritemps, Inc. and/or Hartford Insurance v. Utah Labor Commission, and Johnny Albert : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

AMERITEMPS, INC. and/or)
HARTFORD INSURANCE,)

Petitioners/Appellants,)

vs.)

UTAH LABOR COMMISSION,)
and JOHNNY ALBERT,)

Respondents/Appellees.)

Case No.. 20040953-CA

#1

BRIEF OF RESPONDENT JOHNNY ALBERT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under Utah Code Ann. § 78-2a-3(2)(a), and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES & STANDARD OF REVIEW

1. Issue:

Whether Ameritemps can challenge this Court's jurisdiction despite its failure to raise its claimed right of rehabilitation before the Labor Commission, and thereby exhaust its administrative remedies, and whether styling its argument as "jurisdictional" relieved Ameritemps of its duty to exhaust its administrative remedies as a pre-requisite to asking this Court for relief.

Standard of Review:

Whether this Court can consider a motion to dismiss that was based on arguments not presented to the Labor Commission, is strictly a question of law, and is reviewed under a correction of error standard. Respondents cited *Housing Authority v. Snyder*, 2002 UT 28 ¶ 11, 44 P.3d 724, urging a correctness review. Petitioner agrees, and urges this Court to dismiss Respondent's claim for precisely the same reasons the Utah Supreme Court dismissed Housing Authority's appeal in that case. Housing Authority's claim against Snyder was dismissed because it failed to provide a federally required grievance procedure, and thereby failed to exhaust its administrative remedies. Consequently, the district court lacked subject matter jurisdiction over Housing

Authority's contract claims, and the Supreme Court reversed the district court's opinion with prejudice. *Id.* at 730.

This Court should dismiss Ameritemps' claim under the reasoning of *Housing Authority*. *Housing Authority*'s facts are procedurally similar because like *Housing Authority*, Ameritemps seeks to dismiss Mr. Albert's claims because of a claimed right. Like *Housing Authority*, Ameritemps failed to exhaust its administrative remedies before asking this Court for relief. Accordingly, this Court should conclude that Ameritemps failed to exhaust its administrative remedies because it failed to assert its claimed right of rehabilitation before the Commission. Consequently, UAPA bars this Court from granting Ameritemps' dismissal. Utah Code Ann. § 63-46b-14(2).

Preservation for Review:

Ameritemps failed to preserve this argument on appeal, because it never presented its "right to rehabilitate" argument to the Labor Commission. Nor did Ameritemps appeal the facts of its own stipulation that Mr. Albert was permanently totally disabled. Having failed to exhaust its administrative remedies, Ameritemps can not now ask this Court to dismiss solely because it was "denied the right" to rehabilitate Mr. Albert.

2. Issue:

Whether Mr. Albert's permanent total disability was directly caused by alleged pre-existing or non-industrial injuries depends first on whether the Commission found facts that supported pre-existing or non-industrial injury defenses, and failing that,

whether Ameritemps preserved those factual issues on appeal. Because there were no factual issues on appeal, then the remaining issue is whether the Commission correctly applied the law to the facts, finding that Mr. Albert's last industrial accident with Ameritemps directly caused his permanent total disability.

Standard of Review:

Whether the Commission correctly determined that Mr. Albert's Ameritemps directly caused his permanent total disability is a mixed question of law and fact. *Drake v. Indus. Comm'n*, 939 P.2d 177, (Utah 1977). In reviewing a legal question that is highly fact-dependent, as here, this Court affords great deference to the Commission's application of the law to the facts. The Commission applied the odd-lot doctrine to determine if Mr. Albert's industrial accident was the "direct cause" of his industrial accident. Because the issue on appeal is whether the Commission correctly applied the law to the facts of Mr. Albert's case, *Drake* requires this Court to accord broad discretion to the Commission's fact-dependent legal analysis. *Id.* at 182.

The "direct cause" of Mr. Albert's disability under the odd-lot doctrine was a fact-dependent determination, and consequently, the legal issue – whether the Commission correctly applied the law to the facts – does not permit this Court to announce "a coherent statement of the law," that applies to all "direct cause" or "odd-lot" cases. *Id.* at 182. At the same time, this Court must exercise scrutiny due to the policy of liberally construing the Worker's Compensation Act to "resolve any doubt respecting the right of

compensation in favor of the injured employee.” Id. (quoting *State Tax Comm’n v. Indus. Comm’n*, 685 P.2d 1051, 1053 (Utah 1984) with approval). Accordingly, this Court should accord the Commission’s application of the odd-lot doctrine to the facts of this case great deference, with a view to resolving doubts in favor of compensating Mr. Albert.

Preservation for Review:

Ameritemps preserved its argument as to whether Mr. Albert’s Ameritemps industrial accident was the “direct cause” of his permanent total disability. Ameritemps’ argument is based on facts not found by the Commission, and Ameritemps did not appeal any of the factual findings. Consequently, the only issue preserved on appeal is whether the Commission correctly applied the law to the facts of Mr. Albert’s case.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The pertinent statute is the permanent total disability statute, contained in the Workers’ Compensation Act: Utah Code Ann. § 34A-2-413.

STATEMENT OF THE CASE

Johnny Albert (“Mr. Albert”) was seriously injured in four separate industrial accidents over the span of seven years. Mr. Albert injured his low back in August, 1990, (Quality Plating), and January, 1991 (Barnard & Burk), resulting in 5% whole person impairment. On July 28, 1991, Mr. Albert fell from a building and shattered his right heel, causing the need for multiple surgeries, and causing a 9% whole person impairment.

Over the next five years, Mr. Albert recuperated from his surgeries, and worked with the Utah Division of Rehabilitation. Mr. Albert was diagnosed with psychological conditions that included depression, learning disorder, written communication disorder, cognitive disorder, personality disorder, with borderline intellectual functioning. Mr. Albert was later assigned a 30% whole person impairment rating due to psychological conditions, with 10% undifferentiated industrial causes, and 20% that pre-dated his industrial injuries. Despite the legion of impairments (44% whole person impairment), Mr. Albert returned to work with Ameritemps.

On June 16, 1997, Mr. Albert crushed his left great toe between a steel I beam and a pallet jack while working for Ameritemps. The crush injury required four toe surgeries including one fusion (failed), and a refusion, which resulted in 4% additional whole person impairment. As a direct result of the accident, Mr. Albert had new work limitations, and according to his doctor: “[Mr. Albert] cannot walk much except to and from work, should not be doing any carrying, lifting, etc.” Combined with his prior impairments, Mr. Albert had sustained 48% whole person impairment, and never returned to work.

At the Labor Commission hearing, the parties stipulated that Mr. Albert was permanently totally disabled, and the sole remaining issue was which accident, if any, directly caused Mr. Albert’s permanent total disability.

The ALJ found that the Ameritemps accident was the direct cause of Mr. Albert’s

permanent total disability.

Ameritemps filed a motion for review, and argued that: 1) the Ameritemps accident was not the direct cause of Mr. Albert's permanent total disability; and 2) the Ameritemps accident caused impairment, but not disability. Ameritemps did not appeal the Commission's factual finding that Mr. Albert sustained no subsequent non-industrial impairment to his toe after his Ameritemps injury. Nor did Ameritemps, much less challenge the facts or law concerning its stipulation that Mr. Albert was permanently totally disabled, much less that it was denied the right to rehabilitate Mr. Albert.

The Labor Commission denied Ameritemps' motion for review, and this appeal followed.

SUMMARY OF ARGUMENT

Ameritemps' appeal should be denied because it did not argue that it had the right to rehabilitate Mr. Albert in its motion for review. In its motion for review, Ameritemps did not challenge its own stipulation that Mr. Albert was permanently totally disabled. Nor did it challenge the legal effect of its stipulation – that Mr. Albert could not be rehabilitated. Consequently, Ameritemps can not now ask this Court to dismiss for lack of subject matter jurisdiction based on its claimed right to rehabilitate Mr. Albert because it never challenged the underlying factual or legal issues. Styling the argument as “jurisdictional” did not enable Ameritemps to challenge issues not preserved on appeal. This Court can not grant Ameritemps' relief because Ameritemps failed to preserve its

claimed right of rehabilitation on appeal.

Ameritemps' appeal should also be denied because its argument that its accident did not directly cause Mr. Albert's permanent total disability was contradicted by the Commission's factual findings, and Ameritemps did not challenge the facts on appeal. But even if it had preserved the issue, the facts were supported by substantial evidence. Ameritemps argued on appeal that Mr. Albert was disabled because of pre-existing or subsequent non-industrial injuries. But the Commission specifically found that Mr. Albert had no subsequent non-industrial impairments. Nor did the Commission find that any of Mr. Albert's pre-existing conditions materially worsened after the Ameritemps injury. Instead, the Commission found that Mr. Albert worked through multiple industrial injuries that caused significant impairment before his Ameritemps injury. It also found that Mr. Albert sustained significant impairment as a result of his Ameritemps injury, and that Mr. Albert could not return to work after that injury. Ameritemps appeal raised only "mixed issues of law and fact." Therefore, the only issue is whether the Commission correctly applied the law to the facts.

The Commission correctly applied the law to the facts when it applied the odd-lot doctrine to find Mr. Albert permanently totally disabled as a direct result of the Ameritemps accident. The odd-lot doctrine holds employers liable for the entire disability that results from a combination of prior disability and the present injury. The odd-lot doctrine applies where the statute does not permit apportionment of permanent

total disability claims. Neither the former nor the present statute permits apportionment of permanent total disability claims. The doctrine is accepted in virtually every jurisdiction, and Utah Courts have consistently applied the odd-lot doctrine in permanent total disability cases arising under the prior permanent total disability statutes. Therefore, this Court should affirm that the Commission correctly applied the law when it applied the odd-lot doctrine to Mr. Albert's case. This Court should also apply a deferential review of the Commission's decision because of the fact-specific nature of the odd-lot doctrine to Mr. Albert's case. This Court should also follow well-settled policy to construe the statute with a view to resolving doubts in favor of compensating Mr. Albert.

ARGUMENT

I. Ameritemps Waived Its Right To Rehabilitate Mr. Albert When It Agreed That He Was Permanently Totally Disabled.

This Court should find that Ameritemps waived its right to rehabilitate Mr. Albert when it stipulated that Mr. Albert was permanently totally disabled. The facts show that Ameritemps failed to preserve this issue on appeal. But if this Court addresses this argument on the merits, it should find that Ameritemps waived its right to rehabilitate Mr. Albert when it stipulated that he was permanently totally disabled. For these reasons, this Court should affirm the Commission's award of benefits to Mr. Albert.

A. Ameritemps Failed to Preserve This Issue On Appeal.

This Court should refuse to address this issue because Ameritemps did not preserve the issue on appeal. The Utah Administrative Procedures Act requires parties to first exhaust their administrative remedies before this Court can grant relief: "A party may seek judicial review only after exhausting all administrative remedies available" Utah Code Ann. § 63-46b-14(2). It is well settled that "issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." *Brown & Root v. Labor Comm'n*, 947 P.2d 671, 677 (Utah 1997). In workers' compensation claims, all issues must be presented to the Commission to satisfy the statute's exhaustion requirement.

The facts show that Ameritemps failed to raise this issue before the Commission. First, Ameritemps never made this argument at Mr. Albert's hearing. To the contrary, Ameritemps conceded that Mr. Albert was permanently totally disabled. Hearing

Transcript at 17; (R835 at 17). Second, Ameritemps' motion for review failed to raise this issue. The motion only argued that: (1) the evidence was insufficient to support the award; and (2) the accident caused Mr. Albert injury, but did not disable him.

Ameritemps Motion for Review at unnumbered (2 and 6); (R 592 and 596).

Consequently, Ameritemps failed to exhaust its administrative remedies, and never gave the Commission the opportunity to address this issue. Ameritemps seeks to raise this issue for the first time on appeal, and should be denied.

For these reasons, this Court should decline to address this issue for the first time on appeal, and should affirm the Commission's award of benefits to Mr. Albert.

B. Ameritemps Waived Its Right To Rehabilitate Mr. Albert When It Agreed That Mr. Albert Was Permanently and Totally Disabled.

Ameritemps' argument that this Court lacks subject matter jurisdiction contradicts its own admission that Mr. Albert was permanently totally disabled. The permanent total disability statute permits parties to stipulate that an employee is permanently totally disabled, and avoid the re-employment activities contemplated under subsection 6: "A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties . . ." Utah Code Ann. § 34A-2-413(6). In this case, the Order found that Ameritemps agreed to Mr. Albert's permanent total disability, but disputed that its accident directly caused the disability. ALJ Order at 5 (R 499).

The Order found that each of the respondents admitted that Mr. Albert was permanently totally disabled, but respondent denied that its respective injury was the direct cause of Mr. Albert's disability:

The respondents conceded that Mr. Albert was permanently and totally disabled. However, each of the respondents alleged that an injury other than the one respectively defended by the individual respondents directly caused Mr. Albert's permanent total disability.

ALJ Order at 5, ¶ F (R 499).

By definition, permanently totally disabled employees are unable to be re-employed under the Act. The Act generally contemplates a two step process¹ for permanent total disability ("PTD") claims: first, the employee must show that he is tentatively permanently totally disabled ("step one"); and second, the burden shifts to the employer to either prepare a re-employment plan ("step two"), Utah Code Ann. § 34A-2-413 (6)(a)-(c), or pay the claim, *Id.* at § 413(6)(d)-(e). Employees are tentatively permanently totally disabled when they have satisfied their burden of proof (first step), and the ALJ must so find. *Id.* at § 413(6)(a). The tentative finding of permanent total disability is subject to the employer's right to re-employ the injured worker, but employers are not required to file re-employment plans. *Id.* at § 413(6)(d). In other

¹ For a good discussion of re-employment plans in permanent total disability cases, see *Thomas v. Color Country Management*, 84 P.3d 1201, 1207-8 (Utah 2004).

words, employees who meet their burden of proof under step one are permanently totally disabled unless the employer successfully re-employs the injured worker.

In this case, the Order found that respondents stipulated that Mr. Albert was permanently totally disabled (“step two”); not “tentatively” permanently totally disabled (“step one”). ALJ Order at 5 (R 499). By admitting that Mr. Albert was permanently totally disabled, as opposed to “tentatively” permanently totally disabled, all of respondents acknowledged that Mr. Albert could not be re-employed. Having admitted that Mr. Albert could not be re-employed, Ameritemps can not now complain that the ALJ entered a final order of permanent total disability. Ameritemps waived its right to re-employ Mr. Albert under subsection 6 when it agreed that Mr. Albert was permanently totally disabled.

Ameritemps can not avoid challenging the underlying facts on appeal by calling its argument “jurisdictional.” Brief at 13. The final order of permanent total disability was based on Ameritemps’ agreement that Mr. Albert was permanently totally disabled. Ameritemps can not simply ignore its own complicity: it stipulated that Mr. Albert was permanently totally disabled. Ameritemps had to challenge the fact of its own stipulation as a pre-requisite to its “jurisdictional” challenge.

Because the Commission found that Ameritemps stipulated to Mr. Albert’s permanent total disability, the factual finding is must be upheld unless Ameritemps demonstrated that the finding was clearly erroneous. Empirical facts of the case are

reviewed for clear error. *Drake v. Indus. Comm'n*, 939 P.2d 177,181(Utah 1997).

Whether Ameritemps stipulated that Mr. Albert was permanently totally disabled was an empirical fact. Ameritemps has not challenged that finding on appeal. Accordingly, its brief did not dispute its own stipulation. Rather, the brief simply ignored this fact, steadfastly arguing that it had the right to attempt to re-employ Mr. Albert. Brief at 13. Ameritemps has failed to shoulder its burden in challenging the Commission's facts, because it has not even marshaled the evidence – let alone demonstrated any “clear error” contained in the Order – and must be denied. Consequently, this Court must accept Ameritemps' stipulation as fact, and deny Ameritemps' appeal.

* * *

Based on the foregoing, this Court should find that Ameritemps failed to preserve this issue for appeal because it did not raise its claim to re-employ Mr. Albert before the Commission. Even if this Court reaches the merits, however, this Court should find that Ameritemps' admission that Mr. Albert was permanently totally disabled, and not tentatively permanently totally disabled, was a factual admission that Mr. Albert could not be re-employed under the Act. Ameritemps did not appeal the fact of its stipulation, and therefore can not challenge it on appeal. Even if it had preserved this issue, this Court should affirm because the finding was supported by substantial evidence. Ameritemps has not demonstrated that the finding was clearly erroneous. Consequently, Ameritemps waived its right to re-employment under subsection 6 of the permanent total disability

statute. For these reasons, this Court should deny Ameritemps' appeal, and affirm the Commission's award of benefits to Mr. Albert.

II. The Commission's Conclusion That Mr. Albert Was Permanently and Totally Disabled From His Ameritemps Injury Was Supported By Substantial Evidence, And Was Consistent With Utah Law.

This Court should conclude that the Commission's award of benefits was supported by substantial evidence. This section demonstrates that Ameritemps' argument was based on facts not found by the Commission. Having failed to appeal the findings of fact, Ameritemps' appeal must fail. This section also shows that the Commission correctly applied the law to the facts of Mr. Albert's case when it relied on the odd lot doctrine in awarding Mr. Albert's permanent total disability benefits.

A. This Court Should Deny Ameritemps' Appeal Because It Was Based On Facts Not Found By the Commission, And Ameritemps Did Not Appeal The Commission's Findings of Fact.

Ameritemps' arguments were not supported by the Commission's findings of fact, and Ameritemps did not appeal the Commission's factual findings, therefore Ameritemps' appeal should be denied. Ameritemps argued that its injury was not the direct cause of Mr. Albert's permanent total disability, and that instead, Mr. Albert was permanently totally disabled by his low back injuries, or alleged subsequent non-industrial injuries to his left great toe. Brief at 16 and 19. But the Commission's factual findings undercut Ameritemps' legal argument.

1. Ameritemps' Argument that Mr. Albert Was Disabled Because of His Low Back Injuries Contradict The Facts, Which Show That Mr. Albert Sustained No Additional Low Back Impairment After His 1991 Industrial Accident, And Mr. Albert Continued To Work Years After He Injured His Low Back.

Ameritemps appeal should be denied because the facts show Mr. Albert sustained no additional low back impairment after his 1991 injury with Barnard & Burk.

Ameritemps argued that Mr. Albert's low back injury was the direct cause of his disability. Brief at 16. The Commission found that Mr. Albert sustained a 2 ½ % whole person impairment from his January 21, 1991 industrial accident with Barnard & Burk. ALJ Order at 12 (R 506). But there were no findings that Mr. Albert's low back injury became further impaired after his last low back injury in 1991. Nor did his back injury prevent him from working at subsequent positions with American Asbestos and Ameritemps; Mr. Albert continued working until his 1996 Ameritemps injury. ALJ Order at 21 (R 515). The Commission's finding that the Ameritemps injury directly caused Mr. Albert's permanent total disability was supported by substantial evidence in the record. For these reasons, this Court should deny Ameritemps' appeal, and affirm the Commission's award of benefits to Mr. Albert.

2. *The Facts Contradicted Ameritemps' Argument That Mr. Albert Was Disabled From Subsequent Non-Industrial Injuries.*

The facts show that Mr. Albert was disabled as a direct result of his Ameritemps injury. Ameritemps argued that the Commission should have found Mr. Albert disabled by other subsequent non-industrial impairments. Brief at 10.² These subsequent impairments, so the Brief argued, would conflict with the Commission's finding that Ameritemps accident directly caused Mr. Albert's permanent total disability. *Id.* But the Brief conceded that the Commission did not make the factual findings that supported its defense. *Id.*³ To the contrary, the Commission found no subsequent non-industrial injuries to Mr. Albert's great toe:

[N]o medical evidence existed that demonstrated a causal connection between the subsequent incidents referred to by Ameritemps and a significant, or ratable, impairment to Mr. Albert's left foot other than that caused by his June 16, 1997 industrial accident.

ALJ Order at 16 n. 11. The Commission specifically found that Mr. Albert had suffered no subsequent non-industrial impairment to his left great toe. Ameritemps' brief admitted as much. Brief at 10. Ameritemps had to appeal and reverse these facts for its argument to succeed, but did not.

² "Specifically, RESPONDENTS (sic) contend PETITIONER (sic) became permanently and totally disabled as a result of his pre-existing back condition and as a result of his subsequent non-industrial left great toe injury." Brief at 10.

³ "[N]either the ALJ nor the Appeals Board made a finding of fact with respect to PETITIONER's (sic) back pain and subsequent left toe injury" Brief at 10.

Ameritemps' appeal is based on facts that contradicted the Commission's findings. This Court would have to reverse the factual findings to grant Ameritemps' appeal because it was based on a finding that contradicted the Commission's findings. This Court can not grant Ameritemps' relief, however, because Ameritemps did not appeal the relevant factual findings in this case. Instead, Ameritemps conceded that it had appealed a "mixed question of law and fact," and not the Commission's factual findings. Brief at 4. Ameritemps' appeal can not succeed because it is based on facts not found by the Commission and not raised on appeal.

3. *Ameritemps Did Not Appeal The Commission's Finding that Mr. Albert Did Not Suffer Additional Non-Industrial Impairment After the Ameritemps Accident.*

Ameritemps' appeal must fail because it was premised on facts not found by the Commission and not challenged on appeal. Ameritemps' argument contained two subpoints: (1) Additional Facts That Preclude an Award of Permanent Total Disability; and (2) The Labor Commission Misapplied the Law to the Facts. Point 1 recited portions of the record, and argued that those were "facts," and that those "facts" contradicted the Commission's conclusion that Mr. Albert's industrial accident with Ameritemps was the direct cause of his disability. Brief at 14-21.⁴

But the Commission did not make any findings of subsequent non-industrial impairment. To the contrary, the ALJ specifically found that Ameritemps failed to prove that Mr. Albert suffered subsequent non-industrial impairments. ALJ Order at 16 n. 11. Ameritemps never cited to this finding in its brief, and has not directly challenged the finding on appeal. Apart from

⁴ The section is entitled "Additional Facts That Preclude an Award of Permanent Total Disability." Brief at 14.

preserving the issue on appeal, Ameritemps also had the duty to marshal the evidence to demonstrate that the finding was clear error. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah App. 1989). Under *Grace Drilling*, this Court will uphold the findings where they were supported by substantial evidence when reviewing the record as a whole. *Id.* at 68. The party challenging the facts must marshal all of the evidence. *Id.* This Court recently rejected a party's appeal where the party "failed to completely satisfy his obligation to marshal the evidence by persistently arguing [his] own position without regard for the evidence supporting the [ALJ's] findings." *McLaws v. Kazamini*, 2004 UT App 250 (citations omitted). Similarly, Ameritemps' brief recited unsupported statements Mr. Albert made in his deposition and at trial. As shown above, the ALJ found these statements insufficient to warrant a finding that Mr. Albert had sustained a new injury, in the absence of corroborating specific medical documentation of disability. ALJ Order at 16 n. 11 (R 510). This Court can not grant Ameritemps appeal because it was based on facts not found by the Commission, and not preserved on appeal.

* * *

Ameritemps has prevented this Court from granting the relief it seeks by failing to preserve the factual issues for appeal, and by failing to marshal the evidence in support of its argument. Therefore, this Court should affirm the Commission's award of benefits to Mr. Albert. But even if Ameritemps had preserved the issue and marshaled the evidence, this Court should also affirm the Commission's award because its findings were supported by substantial evidence.

4. *The Commission's Findings As To Mr. Albert's Left Toe Injuries Were Supported By Substantial Evidence.*

This Court should affirm the Commission's findings as to Mr. Albert's June 16, 1997 Ameritemps injury and its natural sequellae, because they were supported by substantial evidence. The Order found that the facts of Mr. Albert's Ameritemps injury were undisputed, and that Mr. Albert had crushed his left great toe between a steel I-beam and a pallet jack. The Order found that contemporaneous x-rays showed a "significantly angulated fracture of the first proximal phalanx with probable intra-articular extension." ALJ Order at 15; (R 509). Mr. Albert had his first left toe surgery on June 30, 1997; his second on November 14, 1997; his third (first fusion) on March 11, 1998; and, his fourth (re-do fusion) on July 31, 1998. *Id.* The Order found that Mr. Albert had sustained a 4% whole person impairment as a result of his Ameritemps injury. *Id.* at 16; (R 510).

The facts show that the Ameritemps injury significantly limited Mr. Albert's ability to walk and stand. As set forth in the facts, Mr. Albert previously sustained a 9% whole person impairment for his July 28, 1991 right foot injury with American Asbestos. On November 30, 1993, Dr. Howe stated that Mr. Albert's right foot injury "[p]reclu[ded] [him] from heavy lifting, climbing ladders, working at heights and from frequent walking, squatting, kneeling, and stair climbing." ALJ Order at 18; (R 512). The Order observed that "after a lengthy convalescence Mr. Albert sallied forth again into the work force at Ameritemps," and that after the Ameritemps injury, Dr. Howe restricted Mr. Albert to "a light duty job, basically a sit-down job. He cannot walk much except to and from work, should not be doing any carrying, lifting, etc." *Id.* In other

words, the facts show that the Ameritemps injury caused Mr. Albert to have little or no use of his feet.

The Order's finding that Mr. Albert had sustained an "impairment or combination of impairments" from his Ameritemps injury was supported by substantial evidence, but no evidence that Mr. Albert sustained subsequent non-industrial injuries to his left great toe. Consequently, Ameritemps' argument is not supported by the facts. This Court should deny Ameritemps' appeal, and affirm the Commission's award of benefits to Mr. Albert.

5. *The Commission's Findings As To The Direct Cause of Mr. Albert's Permanent Total Disability Were Supported By Substantial Evidence.*

This Court should conclude that the Commission finding as to the direct cause of Mr. Albert's permanent total disability were supported by substantial evidence. The evidence showed that before the Ameritemps accident, Mr. Albert was able to work despite significant pre-existing injuries resulting in loss of function in his low back, left foot, and psychological condition, totaling 44% whole person impairment:

Mr. Albert's industrial accident with American Asbestos on July 28, 1991 resulted in a 9% whole person impairment as a result of injuries to his right foot caused by the accident. Mr. Albert also suffered from serious psychological problems that caused him considerable learning difficulty in learning new tasks or performing jobs that required any mental acuity. Mr. Albert's psychological impairment, 20% preexisted his industrial accidents, and 10% derived undifferentiated from his industrial injuries. Mr. Albert's collective physical and psychological problems left him 48% impaired as to the whole person.

Mr. Albert with all of his physical and psychological problems did in fact return to work with Ameritemps until his final industrial accident on June 16, 1997. However, after Mr. Albert fractured his left great toe on June 16, 1997 followed by four consequent surgeries, Mr. Albert did not return to work. Mr. Albert's

industrial accident with Ameritemps on June 16, 1997 resulted in a 4% whole person impairment as a result of injuries to his left foot caused by the accident.

ALJ Order at 29 (R 523). The ALJ found it significant that Mr. Albert had succeeded in repeatedly returning to the workforce despite his significant impairments. Id. Due to the Ameritemps injury, Mr. Albert endured four toe surgeries including two fusions, constant pain, and joint ankylosis that resulted in a 4% whole person impairment. Id. The facts supported the Commission's conclusion that the Ameritemps accident was the direct cause of Mr. Albert's permanent total disability.

B. The Commission's Determination That Mr. Albert Was Permanently Totally Disabled Was Well Reasoned And Consistent With Utah Law.

1. The Odd Lot Doctrine Applied To Mr. Albert's Case.

The Commission also correctly determined the ultimate legal issue of disability when it applied the odd lot doctrine to Mr. Albert's case. The Order first reasoned that in the absence of statutes permitting apportionment, employers are subject to the odd lot doctrine. The doctrine generally holds employers liable for the entire disability resulting from a combination of the prior disability and the present injury. ALJ Order at 29 (R 523) (quoting LARSON'S WORKERS' COMPENSATION LAW § 90.01 (2002)). This is known as the "odd lot doctrine." Under the odd lot doctrine, the Commission may find permanent total disability when a relatively small percentage of impairment combines with other factors unable to obtain suitable employment. *Hoskins v. Indus. Comm'n*, 918 P.2d 150, 154 (Utah App. 1996). In Mr. Albert's case, the ALJ applied the doctrine when he concluded that Mr. Albert's last injury to his left great toe

combined with other impairments to render him permanently totally disabled as a direct result of his Ameritemps injury.

This Court should specifically conclude that the odd lot doctrine applied to Mr. Albert's case. Ameritemps argued that the Commission misapplied the law, Brief at 21, but most jurisdictions apply the odd lot doctrine where the statute does not permit apportionment. LARSON'S at § 83.01.⁵ Neither the former or current Utah statutes permit apportionment of permanent total disability claims. Accordingly, Utah Courts regularly applied the odd lot doctrine in permanent total disability cases arising under the former statute. See e.g., *Peck v. EIMCO, Process Equip. Co.*, 728 P.2d 572 (Utah 1987); *Norton v. Indus. Comm'n*, 728 P.2d 1025 (Utah 1986); *Hardman v. Salt Lake City Fleet Mgmt.*, 725 P.2d 1323 (Utah 1986); *Marshall v. Indus. Comm'n*, 681 P.2d 208 (Utah 1984). In this case, the Commission applied the odd lot doctrine under the present statute to find that Mr. Albert was permanently totally disabled as a result of his Ameritemps injury.

2. *The Commission Correctly Applied The Odd Lot Doctrine To Mr. Albert's Case When It Awarded Him Permanent Total Disability Benefits.*

This Court should affirm the Commission's award of benefits to Mr. Albert because it correctly applied the odd lot doctrine to Mr. Albert's facts. This Court applied the odd lot doctrine in a case with similar facts. In *Smith v. MityLite*, 939 P.2d 684 (Utah App. 1997), this Court held that an employee's last injury contributed to his inability to work, and directly caused his disability under the odd lot doctrine. In that case, the employee suffered from depression,

⁵ The treatise states that, "Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." *Id.* (footnotes omitted).

somatoform pain disorder, opiate dependency, and personality disorder. *Id.* at 690. The employee had nonetheless continued to work through these impairments. The Commission had errantly denied the claim because the low back injury had not “wholly caused” the employee’s disability. *Id.* at 691. This Court reasoned that “such a standard for causation was simply too high.” Instead, this Court found that “an industrial accident caused a portion of Smith’s physical impairment; that he cannot perform his former job; and that he is currently disabled.” *Id.* Therefore, the Commission should have found that Mr. Smith was disabled as a result of the last industrial accident.

Similarly, the Commission applied the odd lot doctrine to Mr. Albert’s facts. Like the former statute, the present permanent total disability statute does not permit apportionment of permanent total disability claims. Like the *MityLite* case, Mr. Albert suffered from multiple impairments before his 1996 accident with Ameritemps: Mr. Albert sustained 2 ½ % whole person impairment (“wpi”) from his 1990 low back injury at Quality Plating; 2 ½ % wpi from his 1991 low back injury with Barnard & Burke; 9% wpi from his 1991 right foot injury at American Asbestos; 30% wpi from psychological or emotional impairments, of which 10% was undifferentiated industrial. ALJ Order at 28-9; (R 522-3). Like the *MityLite* case, Mr. Albert could no longer perform his job after the Ameritemps injury. The Order reasoned that:

[D]espite the legion of medical and psychological impairments . . . Mr. Albert . . . remained able to work until the injury he sustained on June 16, 1997 with Ameritemps. The fractured great toe on June 16, 1997, with the subsequent four surgeries and 4% whole person impairment, proved to be the proverbial straw that broke the camel’s back. Mr. Albert never returned to work after the June 16, 1997 industrial accident, and thereafter remained permanently totally disabled. Hence, Mr. Albert’s industrial accident of June 16, 1997 directly caused his permanent total disability.

Id. at 30 (R 524). Mr. Albert's facts showed that despite significant pre-existing impairment, he continued to work until the Ameritemps injury. The Commission correctly applied the odd lot doctrine to Mr. Albert's facts when it concluded that the Ameritemps injury combined with his other impairments to render him permanently totally disabled, and directly caused his disability.

3. *Under A Deferential Standard of Review, This Court Should Uphold The Commission's Application Of The Law To The Facts.*

This Court should uphold the Commission's award of benefits under a deferential standard of review. As discussed supra, the *Drake* case requires this Court to apply a deferential standard of review to the Commission's application of the law to the facts, because the odd-lot doctrine is a highly fact-dependent analysis. Determining the direct cause of applicants' permanent total disability claims depends largely on the specific facts of Mr. Albert's case. The Commission's application of the odd-lot doctrine to Mr. Albert's case should be given great deference, because this Court can not hope to fashion a statement of law that can adequately anticipate all of the possible facts that may arise in each particular case. Accord, *Drake*, 939 P2.d at 182. Moreover, affirming the award is consistent with this Court's policy of construing the Act to resolve doubts in favor of compensating injured workers. Id.

In summary, the Commission correctly applied the odd lot doctrine to apply the current statutory requirement that the industrial accident be the "direct cause" of the employee's permanent total disability. Mr. Albert's case presents an opportunity for this Court to confirm that the odd lot doctrine applies to cases arising under the current statute. Under *Drake*, this Court should accord great deference to the Commission's application of the law to the facts, because the odd-lot doctrine is a fact-dependent determination. This Court should hold that the

Commission correctly applied the law to the facts, and reject Ameritemps argument that it misapplied the law. For these reasons, this Court should deny Ameritemps' appeal, and affirm the Commission's award of permanent total disability benefits to Mr. Albert.

CONCLUSION

This Court should deny Ameritemps' appeal and affirm the Commission's award of benefits to Mr. Albert. This Court should affirm that Ameritemps failed to preserve the issue on appeal, but on the merits, waived its right to re-employ Mr. Albert when it conceded that he was permanently totally disabled. This Court should also affirm that the Commission's determination that the Ameritemps injury was the direct cause of Mr. Albert's disability because it was supported by substantial evidence, and because Ameritemps' argument was based on facts not found by the Commission, nor preserved for consideration on appeal. For these reasons, this Court should deny Ameritemps' appeal, and affirm the Commission's award of permanent total disability benefits to Mr. Albert.

DATED this 6th day of May, 2005.

KING, BURKE & SCHAAP, P.C.



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CERTIFICATE OF MAILING

I certify that on the 6th day of May, 2005, I mailed a true and correct copy of the foregoing document, first class postage prepaid, to the following:

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